THE ATTORNEY GENERAL OF TEXAS

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ATTORNEY GENERAL

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Mr. Joe E. Milner
Texas Department of Public Safety
5805 North Lamar Blvd.
Box 4087
Austin, Texas 78773-0001

Open Records Decision No. 553

Re: Availability under the Open Records Act of reports of wiretapping filed by judges and prosecutors under the Code of Criminal Procedure article 18.20, section 15(c) (RQ-1777)

Dear Mr. Milner:

The Texas Department of Public Safety has received a request under article 6252-17a, V.T.C.S., the Texas Open Records Act, for reports on interceptions of wire, oral, or electronic communications effectuated under article 18.20 of the Code of Criminal Procedure. Judges and prosecutors are required by federal and state law to submit these reports to the Administrative Office of the United States Courts. 18 U.S.C. § 2519; Code Crim. Proc. art. 18.20, § 15. Copies of these reports are also required to be filed with the director of the Department of Public Safety (DPS). Id. § 15(c).

Section 15(a) of article 18.20, which states the judge's reporting requirement, provides as follows:

> (a) Within 30 days after the date an order or the last extension, if any, expires or after the denial of an order, the issuing or denying judge shall report to the Administrative Office of the United States Courts:
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> (1) the fact that an order or extension was applied for;
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> (2) the kind of order or extension applied for;
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> (3) the fact that the order or extension was granted as applied for, was modified, or was denied;

(4) the period of interceptions authorized by the order and the number and duration of any extensions of the order;

(5) the offense specified in the order or application or extension;

(6) the identity of the officer making the request and the prosecutor; and

(7) the nature of the facilities from which or the place where communications were to be intercepted.

The prosecutor's reporting requirement, Code Crim. Proc. art. 18.20, § 15(b), is as follows:

(b) In January of each year each prosecutor shall report to the Administrative Office of the United States Courts the following information for the preceding calendar year:

(1) the information required by Subsection (a) of this section with respect to each application for an order or extension made;

(2) a general description of the interceptions made under each order or extension, including the approximate nature and frequency of incriminating communications intercepted, the approximate nature and frequency of order communications intercepted, the approximate number of persons whose communications were intercepted, and the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(3) the number of arrests resulting from interceptions made under each order or extension and the offenses for which arrests were made;

(4) the number of trials resulting from interceptions;

(5) the number of motions to suppress made with respect to interceptions and the number granted or denied;

> (6) the number of convictions resulting from interceptions, the offenses for which the convictions were obtained, and a general assessment of the importance of the interceptions; and
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> (7) the information required by Subdivisions (2) through (6) of this subsection with respect to orders or extensions obtained.

The Department of Public Safety has informed us that as a convenience to the judges and the prosecutors, the DPS Narcotics Technical Unit actually fills out the information in the forms since persons in that unit are involved in all wiretap installations. The forms are then mailed to the judges and prosecutors who review them, sign them, and forward the completed forms to the Administrative Offices of the United States Courts, keeping a copy for their own records. A copy of each report is also mailed to the Director of the Department of Public Safety. Each year, the Director distributes these reports to the state executive and legislative officers identified in section 15(c).

The Department claims that the information is not subject to the Open Records Act because it constitutes information held by the judiciary. Section 2(G) of the Open Records Act provides that the judiciary is not included within the definition of "Governmental Body" in the act; thus, records of the judiciary are not subject to the Open Records Act.

A district attorney's records are not judicial records under the Open Records Act. Attorney General Opinion JM-266 (1984); Open Records Decision No. 78 (1975). A judge's report to the Department of Public Safety relates information relevant to the judicial action of ordering a wiretap. Nonetheless, the judge has a statutory duty to report this information to the department, and the department holds this information in its own right, and not as agent for the judges. Cf. Attorney General Opinion JM-446 (1986) (State Purchasing and General Services Commission acts as agent of the Supreme Court in maintaining court's telephone records). The reports held by the Department of Public Safety are not records of the judiciary within the Open Records Act.

The department also claims that sections 3(a)(1) and 3(a)(8) except the information from disclosure. It states that section 15(c) of article 18.20 limits disclosure of the requested information by specifying the state officials to whom the reports in question shall be submitted, and cites

the maxim of statutory construction, "Expressio unius est exclusio alterius." Section 15(c) provides in part:

> (c) Any judge or prosecutor required to file a report with the Administrative Office of the United States Courts shall forward a copy of such report to the director of the Department of Public Safety. On or before March 1 of each year, the director shall submit to the governor; lieutenant governor; speaker of the house of representatives; chairman, senate jurisprudence committee; and chairman, house of representatives criminal jurisprudence committee a report of all intercepts as defined herein conducted pursuant to this article and terminated during the preceding calendar year. Such report shall include:
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> (1) the reports of judges and prosecuting attorneys forwarded to the director as required in this section . . . .

Code Crim. Proc. art. 18.20, § 15(c).

This provision requires the reports to be forwarded to specific state officials, but nothing in its language removes them from the Open Records Act or prohibits their disclosure to other persons.

We next consider whether these reports are excepted from disclosure by section 3(a)(8) of the Open Records Act as

> records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

V.T.C.S. art. 6252-17a, § 3(a)(8).

This office has interpreted section 3(a)(8) as applicable to information held by a law enforcement agency if release "will unduly interfere with law enforcement and crime prevention." See generally Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977); City of Houston v. Houston Chronicle Publishing Co., 673 S.W.2d 316 (Tex. App. - Houston [1st

Dist.] 1984, no writ); Open Records Decision Nos. 531 (1989); 506 (1988); 412 (1984).

An individual who has been subject to a wiretap, or to an application for an order authorizing a wiretap, will be informed about that action under section 13 of article 18.20. This section provides in part:

> (a) Within a reasonable time but not later than 90 days after the date an application for an order is denied or after the date an order or the last extension, if any, expires, the judge who granted or denied the application shall cause to be served on the persons named in the order or the application and any other parties to intercepted communications, if any, an inventory, which must include . . . .

The notice must include the following information: the fact of the order or the application; the date the order was entered and the period of interception or the date the application was denied; and the fact that communications were or were not intercepted. Thus, the person who was subject to an application or an order learns of it approximately 60 days after the judge has reported to the Administrative Office of the United States Courts and forwarded a copy to DPS pursuant to section 15.

The judge's and prosecutor's reports to DPS do not include the name of the person who was named in the wiretap order. The judge's report includes the following categories of information:

> 1. Court authorizing or denying the intercept;
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> 2. The official making the application and the prosecutor authorizing the application;
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> 3. Offense;
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> 4. Type of order;
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> 5. Duration of intercept;
>
> 6. Type of intercept (i.e. phone, microphone);
>
> 7. Place (i.e. single family dwelling, apartment);

8. Whether or not device was installed and used;

9. Space for further explanatory remarks, with instruction not to include names, addresses or phone numbers of any individuals or places involved in wiretap.

The prosecutor's report includes items 1 through 8, above, as well as the following:

9. Description of intercepts (termination date, number of days in use, frequency of intercepts, number of persons whose communications were intercepted, number of communications intercepted, number of incriminating communications intercepted);

10. Cost;

11. Results (arrests and convictions);

12. Comments and assessment of importance of the interceptions in obtaining convictions, with instruction not to include names, addresses or phone numbers of any individuals or places involved in wiretap.

The prosecutor's reports give a limited amount of information about the approval and use of the wiretap, expressly excluding information that would tend to identify a particular person as being subject to a wiretap order. The reports provide information useful in evaluating the utility of wiretaps. The information in the judge's report overlaps with the prosecutor's report, in parts 1 through 8, as to information about the approval of the wiretap and a few non-identifying details about the particular wiretap.

Law enforcement interests could be harmed if the individual who was subject to the wiretap learned about it prior to the time he received official notice under section 13 of article 18.20. Although the judge's and prosecutor's reports do not state the name, address, or phone number of persons or places involved in the wiretap, they identify the county of the wiretap and the alleged offense. This information could alert an individual to the fact that he has been subject to a wiretap and that an investigation based on the information secured by wiretapping might be underway. An individual could also conclude from a judge's or prosecutor's report denying a wiretap that his conduct was under close scrutiny by law enforcement officers. Until

notice is given to the individual pursuant to section 13 of article 18.20, the judge's and prosecutor's reports are excepted from disclosure in their entirety by section 3(a)(8) of the Open Records Act. This notice is given not later than 90 days after the date an order expires. Once notice is given, there is no longer any law enforcement interest based on keeping from an individual the fact that he has been subject to a wiretap or an order denying a wiretap.

The Department of Public Safety has also stated that the information relates to pending criminal investigations and/or prosecutions, citing Docal v. Bennsinger, 543 F.Supp. 38 (M.D. Pa. 1981). In Docal v. Bennsinger, the court allowed the Drug Administration Authority to withhold "investigatory records relating to active law enforcement efforts to apprehend several DEA fugitives still at large." 543 F.Supp. at 45. Because of the notice requirement under section 13 of article 18.20, Code of Criminal Procedure, the individuals subject to wiretaps or applications for wiretaps know that they are under suspicion. The release of the reports will not cause the harm to law enforcement interests at issue in Docal v. Bennsinger.

The department also states that Open Records Decision No. 143 (1976) suggests that specific information, including costs, concerning electronic surveillance need not be publicly disclosed. Open Records Decision No. 143 stated that descriptions of electronic eavesdropping equipment owned by the Dallas Police Department as well as the exact cost of the equipment was excepted from required public disclosure by the law enforcement records exception, apparently to maintain as confidential the investigative techniques and procedures used in law enforcement. See also Open Records Decision No. 22A (1974). The cost figures on the prosecutor's report relate to the cost of using and monitoring the wiretapping equipment. It does not identify any particular type of equipment or reveal any investigative technique or procedure. The reasoning of Open Records Decision No. 143 is inapplicable to this information.

You have not raised any other arguments under section 3(a)(8) and we do not see from the face of the documents that releasing them in their entirety would interfere with law enforcement. Of course, release of such material in a particular instance might do so. We conclude merely that no documentation of any such interference has been made here. Accordingly, the judge's reports and prosecutor's reports made to the Department of Public Safety under section 15(a) of article 18.20 of the Code of Criminal Procedure are not excepted from disclosure by section 3(a)(8) after the date

for giving notice under section 13 to the individuals who were subject to an order for a wiretap or an application for such order, or whose communications were intercepted by a wiretap.

S U M M A R Y

Reports about applications and orders for interceptions of wire, oral, or electronic communications submitted to the Department of Public Safety by prosecutors and judges pursuant to section 15 of article 18.20, Code of Criminal Procedure, are not records of the judiciary within section 2(G) of the Open Records Act, V.T.C.S. art. 6252-17a. Such reports are not excepted from disclosure under the Open Records Act by section 3(a)(1) of the act in combination with section 15(c) of article 18.20 of the Code of Criminal Procedure. They are excepted by section 3(a)(8) of the act until the subject of the wiretap order or the denial of an application for a wiretap order is sent the notice required by section 13 of article 18.20. After the date for sending notice has passed, the reports are open in their entirety.

Very truly yours,

Jim Mattox

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